

ORIGINAL

WILLKIE FARR & GALLAGHER

RECEIVED

EX PARTE OR LATE FILED

DEC 20 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Direct: 202 429 4736
Fax: 202 887 8979
mhammer@willkie.com

Michael H. Hammer

December 20, 2000

VIA COURIER

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

**Re: MM Docket No. 99-339/Request for Clarification Regarding the Aural
Tone Requirements of the Commission's Video Description Rules, 47
C.F.R. § 79.2(b)(1)(iii)**

Dear Ms. Salas:

Attached is letter that I filed today with the Mass Media Bureau on behalf of The Weather Channel.

An original and two (2) copies of this letter and attachment are submitted herewith.

Please place a copy of this letter and attachment in the docket of this proceeding.

Kindly direct any questions regarding this letter or the attachment to my attention.

Thank you.

Sincerely,

Michael H. Hammer 012

WILLKIE FARR & GALLAGHER

RECEIVED PARTE OR LATE FILED

DEC 20 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Direct: 202 429 4736
Fax: 202 887 8979
mhammer@willkie.com

Michael H. Hammer

December 20, 2000

VIA HAND DELIVERY

Roy J. Stewart
Chief, Mass Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20544

**Re: Request for Clarification Regarding the Aural Tone Requirements of the
Commission's Video Description Rules, 47 C.F.R. § 79.2(b)(1)(iii)**

Dear Mr. Stewart:

This letter is filed on behalf of The Weather Channel ("TWC") which seeks clarification of one narrow aspect of the Commission's video description rules. Specifically, TWC believes that, under the unique circumstances described in this letter, it is in compliance with the aural tone requirement in § 79.2(b)(1)(iii) of the rules when it provides an aural tone prior to the first time that it provides a particular crawl or scroll containing emergency information.¹

By way of background, TWC provides text-only reproductions of emergency weather bulletins released by the National Weather Service ("NWS") and certain state emergency management agencies. TWC distributes these warnings through its Weather Stars, a system of more than 9,000 automated, graphic and/or text computers located at cable headends throughout the United States. TWC's Star system is fully automated, downloads emergency weather bulletins from the NWS and other government agencies, and displays the bulletins to the relevant

¹ 47 C.F.R. § 79.2(b)(1)(iii). See also *In the Matter of Implementation of Video Description of Video Programming*, Report and Order, 15 FCC Rcd. (2000) ("Video Description Order").

Washington, DC
New York
Paris
London

geographic audiences. TWC utilizes four different generations of Weather Stars: Star XL, Star 4000, Star Jr., and Star III.

The Star XLs and Star 4000s, which cover the vast majority of TWC subscribers, produce an aural tone each time a crawl or scroll containing emergency information is provided. The issue addressed here relates only to the Star IIIs and Star Jrs., which impact approximately 6.5% of TWC's subscribers. The Star IIIs, which are older pieces of equipment dating back to 1982, are technically capable of producing an aural tone only prior to the first time that they provide a particular crawl or scroll containing emergency information. TWC is unable to retrofit these units to enable them to provide tones each time a particular crawl or scroll is provided. TWC is replacing the Star IIIs with more advanced Star products, as they become available, and anticipates that by 2003/2004 all Star IIIs will be replaced by more advanced Star products that are capable of producing an aural tone each time a particular crawl or scroll is provided. Today, less than 2.9 million subscribers (or 4% of TWC's total subscribers) are being served by systems using a Star III.

The Star Jrs. cannot currently provide an aural tone prior to a crawl or scroll. They may be upgraded to provide an aural tone like the Star IIIs. However, they cannot be upgraded to provide an aural tone each time a particular crawl or scroll containing emergency information is provided. Approximately 1.8 million subscribers (or 2.5% of TWC's total subscribers) are served by systems using a Star Jr.

In the limited cases in which a Star III or a Star Jr. is used, TWC believes it is reasonable to interpret the video description rules as satisfied by the provision of an aural tone the first time a particular crawl or scroll containing emergency information is provided. Such an interpretation is not inconsistent with the language of the rule or the *Video Description Order*.² Moreover, this interpretation makes sense for several reasons. First, as noted, the audience affected is small, particularly in comparison to TWC's overall customer base of 72 million.

² The rule provides that a crawl or scroll containing emergency information that is not part of a regularly scheduled newscast, or a newscast that interrupts regular programming, must be "accompanied with an aural tone." 47 C.F.R. § 79.2(b)(1)(iii). The language, by its terms, does not require that the aural tone be provided each time that the crawl or scroll is provided. The *Video Description Order* uses language similar to the rule. See *Video Description Order* at ¶ 51 ("To the extent, however, that a broadcast station or MVPD does not interrupt its regular programming to provide emergency information but rather does so through another manner, such as a 'crawl' or 'scroll,' during the programming, we require them to accompany that information with an aural tone, as reflected in the *Notice*."). Likewise, the organization that proposed the aural tone requirement to the Commission uses similar language. See Comments of the National Coalition of Blind and Visually Impaired Persons for Increased Video Access, at 12 ("An aural tone should be required to accompany the print messages to alert blind or visually impaired people to go to a radio, or turn on the SAP or a designated digital channel where the messages are spoken.").

Second, the cost to TWC to replace the Star IIIs and the Star Jrs. would be extraordinary. As noted, the Star IIIs may not be retrofitted. Thus, TWC would have to replace each of the Star IIIs with a Star XL, which cost \$6,500 per unit.³ Based on 1,376 Star IIIs being located in systems as of November, 2000, the replacement cost would be \$8,944,000. Such an expenditure would be all the more unjustified because, as noted, TWC will be replacing the Star IIIs by 2003/2004. Similarly, there is no way to retrofit the Star Jrs. to make them produce an aural tone each time a particular crawl or scroll is provided. If TWC had to replace each of its 3,894 Star Jrs. with a more advanced Star, at a cost of \$6,500 per unit, the cost would be \$25,311,000. The total cost of replacing the Star IIIs and the Star Jrs. would be over \$34 million.

Third, although the Star Jrs. currently do not provide any aural tone prior to a crawl or scroll, they can be upgraded to provide an aural tone, like the Star IIIs, prior to the first time a particular crawl or scroll containing emergency information is provided. The cost for the equipment for such upgrade would be \$250 per unit, or a total of \$973,500 (\$250 x 3,894 units).⁴

³ TWC has a limited number of Star XLs available to it. Because of the lack of availability of parts, it is questionable whether the manufacturer of the Star XL could produce the number of additional units needed. TWC is in the design phase for the next generation of Stars which may be even more expensive due to the additional functionality of these devices. Further, such units will not be available until 2002 at the earliest.

⁴ TWC has already sought and received price quotes from three equipment suppliers for the equipment to upgrade the Star Jrs. However, the process of upgrading the Star Jrs. is complicated and will involve, among other things, reaching a final agreement with an equipment vendor, manufacturing of the equipment by the vendor, and installing the upgrade in nearly 4,000 cable headends across the country. TWC estimates that it will take approximately six to ten months to complete this process. To the extent that the video description rules go into effect prior to the completion of the process, TWC respectfully requests a short term waiver until such time as it completes the upgrade of the Star Jrs. Such a waiver is clearly warranted and consistent with Commission precedent. The Commission may waive its rules when a party can demonstrate that "in the public interest the rule should be waived." *FPC v. Texaco Inc.*, 377 U.S. 33, 39 (1964). See also 47 C.F.R. § 76.7(i). Furthermore, the Commission may waive a provision of its rules for good cause. 47 C.F.R. § 1.3. The Commission "must explain why deviation better serves the public interest and articulate the nature of the special circumstances to prevent discriminatory application and to put future parties on notice as to its operations." *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d (D.C. Cir. 1990). For the reasons set forth in this letter, a short term waiver to allow TWC to upgrade its Star Jrs. would plainly be in the public interest. TWC also clearly presents "special circumstances" because, as explained herein, the national nature of the service, as well as its delivery of weather information through the Star system, create unique compliance problems and costs. Moreover, Commission precedent has provided for limited, short-term waivers of 12-18 months in order to provide for the availability and deployment of equipment required to comply with the applicable Commission rule, as is necessary here. See, e.g., *In the Matter of Charter Communications, Inc., et al. Petition for Waiver of the Requirement To Provide Point of Deployment Modules Contained in Section 76.1204 of the Commission's Rules*, Mem. Op. and Order, DA 00-1870 (Cable Serv. Bur. 2000). The Commission has also granted temporary waivers of its rules in order to avoid forcing cable operators to replace set-top boxes prematurely since "cable operators, and ultimately subscribers, were not intended to bear the costs of replacing equipment prior to the end of its useful life." *GCI Cable, Inc.*, Mem. Op. and Order, CSR-5442-Z, DA 00-1361, at ¶ 7 (Cable
(footnote continued ...)

There would be additional costs related to delivery and installation support as well. However, in order to further the Commission's goals in adopting the video description rules, TWC is willing to undertake the cost of upgrading the Star Jrs.

Fourth, the clarification TWC seeks in this letter is not inconsistent with the policy underlying the video description rules to ensure that critical details of emergency information are accessible to persons with hearing disabilities.⁵ In particular, TWC notes that its viewers often switch to their local broadcast stations for information regarding emergency weather situations because they know that these stations provide highly local details about safety and the protection of property. Therefore, it is not unreasonable and would not undermine the Commission's goals to clarify that the video description rules are satisfied in the limited circumstances described herein.

Fifth, TWC believes that this situation is entirely unique to its service. TWC is a national weather service. It issues approximately 150,000 weather warnings and advisories each year, far more than any local broadcaster or other MVPD. Moreover, TWC's system of distributing weather information through more than 9,000 Stars is also unique. As described above, the cost of replacing the Star IIIs and Star Jrs. would be over \$34 million. By way of comparison, it has been estimated that the cost of compliance for a typical cable network would be between \$100,000 and \$200,000.⁶ Thus, TWC believes that the interpretation of the rules that TWC seeks is especially warranted and would be particularly narrow in its application.

In summary, for the following reasons, TWC believes that it is reasonable for the Bureau to clarify that TWC will be deemed to have satisfied the aural tone requirements of the video description rules when, under the circumstances described above, it provides an aural tone prior to the first time that it provides a crawl or scroll containing emergency information: 1) the interpretation sought is not inconsistent with the language of the Commission's rule, the Order adopting the rule, or the Commission's goals underlying the rule; 2) the audience affected is relatively small; 3) the cost to replace the Star IIIs and Star Jrs. would be approximately \$34 million; 4) TWC is willing to invest over \$1 million to upgrade the Star Jrs. to provide an aural tone; and 5) TWC's circumstances are unique and therefore the interpretation it seeks will be an

(... footnote continued)

Serv. Bur. 2000); *Media General Cable of Fairfax County, Inc.*, Mem. Op. & Order, CSR-5343-Z, DA 99-1240, ¶ 6 (Cable Serv. Bur. 2000). Similarly, a short-term waiver is warranted here, particularly since TWC is willing to expend a substantial sum of money to upgrade its Star Jrs., and it just needs additional time to do so.

⁵ *Video Description Order* at ¶ 49.

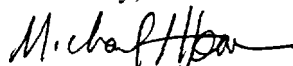
⁶ *Id.* at n. 37.

Mr. Roy J. Stewart
December 20, 2000
Page 5

especially narrow one. Accordingly, TWC respectfully requests that the Bureau clarify that the interpretation described herein is reasonable under the video description rules.

Finally, if the Bureau does not issue the clarification described above, TWC requests, in the alternative, that the Commission grant TWC an “undue burden” exemption under 47 C.F.R. § 79.3(d).⁷ The Commission’s rules state that “[t]he term ‘undue burden’ means significant difficulty or expense.”⁸ TWC has described above the extraordinary cost and technical difficulties that it would face if the exemption (or clarification) is not granted. In particular, the Star IIIs and Star Jrs. cannot be upgraded to provide an aural tone each time a particular crawl is provided, and the cost to replace them would be over \$34 million, a cost that far exceeds that faced by any other entity in complying with the rules. Accordingly, for these reasons and the reasons set out above, TWC clearly qualifies for an “undue burden” exemption.

Sincerely,



cc: Eric J. Bash
Magalie Roman Salas

⁷ See also *id.* at ¶ 42.

⁸ 47 C.F.R. § 79.3(d)(2).